THE FUNDAMENTAL LAW AND THE POWER OF THE COURTS.

PROFESSOR GRAY, in his recent book entitled "The Nature and Sources of the Law," argues at length in support of the view that, in England and the United States at least, the law consists of the rules which the courts enforce, and that the courts are the real makers and creators of the law. He does not directly consider, however, the possible bearing of this view of the meaning of law upon the development of constitutional law in this country. It is the purpose of the writer of the present paper to draw attention to this question, with the object of showing, not only that this view of the meaning of law finds support in the way in which our constitutional law has developed, but that the assumption by the courts in this country of the power to declare void legislative acts which are inconsistent with our written constitutions finds its true explanation in the fact that all of our law is the law of a court. In other words, the development of constitutional law in this country is but another illustration, and a striking one, of the fact that the existence and development of all law, whether fundamental or common, is dependent upon the existence of a court having power to interpret and enforce it. Without the court the law does not exist.

The objection will at once be made that if the explanation of the power of the courts to declare void legislative acts is to be found in the nature and meaning of law, then the fact that a constitution is written can be of no consequence, and the courts of England should therefore claim the same power over legislative acts. But the reason why the regular courts in England do not have this power is, in fact, the very reason why the courts in this country do have, and must exercise, such power. The situation in both countries is explained by the fact that English law is and always has been the law of a court. It is true that this power of the courts in this country does not depend upon the fact that the constitution is written, and the reason why English courts do not have the same power does not depend upon the fact that there is no written con-

stitution in England. The explanation is that in England Parliament itself is and always has been a court, and the highest court in the realm; it was a court before it was a legislature in the modern sense, and its present legislative supremacy is due, historically, to the very fact that it was already the highest court. The lower English courts, which could not at any time question Parliament's judicial declarations of the law, were in no better position to question, on the ground of law, the legislative enactments of Parliament. Assume that there was a fundamental law in England (and such a law was much talked of in the seventeenth century, at the very time when the full extent of the legislative power of Parliament was first becoming recognized), nevertheless, when the two houses of Parliament passed an act, their judgment as to the validity of that act under the law of England was not the judgment of a legislative body merely, but was the judgment of the highest court in the land. No lower court could question the act for the reason that, in its opinion, it was inconsistent with the fundamental law.

The position of Congress in this country is entirely different. It is recognized that it is the duty of Congress, when it passes an act, not only to consider whether the act is consistent with the Constitution, but perhaps even to form the definite opinion that it is constitutional. But such judgment is never more than a legislative judgment; it is not the judgment of a court, and if the Constitution is law in the sense in which law is understood in England and the United States, then some *court* must interpret it and give it effect. Otherwise it ceases to be law at all, just as in England to-day the existence of a fundamental law is not considered, because the two houses of Parliament exercise no regular powers as a court. Their possession of such powers, however, still prevents the other courts from questioning legislative enactments of Parliament as inconsistent with law. It is the purpose of the present paper to develop the contentions here stated more at length.

I.

Professor McLaughlin of Chicago University, in a recent essay on the power of the courts to hold legislative acts void, after quoting from Marshall's opinion in Marbury *v.* Madison,[1] goes on to say:

[1] 1 Cranch (U. S.) 137 (1803).

"Marshall's argument on this phase of the case was brief and direct. To him the Constitution was law, and law meant that the courts were under obligation to accept it and apply it. But of course the mere fact that there was a written constitution in America did not necessarily imply as a logical fact the right of the court to apply that Constitution and *ignore the interpretation of the Constitution by the legislative authority;* that the Constitution was *a law in the sense that it could be and must be maintained by the courts,* even when Congress in exercising its *legislative* power had itself interpreted the Constitution *was the very point at issue.* The thing then to be explained is why Marshall assumed that if the Constitution was law, the courts must place their interpretation on it and not recognize the right of the legislative body to determine its own rights under it." [2]

The explanation of Marshall's assumption in regard to "the very point at issue," as Professor McLaughlin calls it, is to be found, as the present writer contends, in the fact that the Constitution could be law in the English sense only if some court had power to interpret and enforce it; and, while the courts might not "ignore," still they must, if in their judgment erroneous, disregard a merely legislative interpretation of the Constitution. The meaning of the Constitution *as law* could be determined only by the judgment of some court, and Congress, under the Constitution, was not a court.

Professor McLaughlin does not refer to this aspect of the situation, but is content to base Marshall's position upon an "historical background." He says:

"The explanation of Marshall's position must be sought in the historical background, not in mere logical disquisition on the Constitution alone; certainly we cannot rest the judicial authority simply on the supposition that a written constitution can and must be interpreted in courts."

He then traces the idea of a fundamental law back through earlier opinions of courts in this country, and in expressions of various writers in this country and in England. No doubt such expressions are very suggestive as evidence of a general state of mind on the subject, but they do not, after all, explain why lawyers like Marshall accepted so readily, as a necessary logical conclusion,

[2] The Courts, the Constitution and Parties, pp. 9–10.

the view that if the Constitution did create a fundamental law, then the courts must interpret that law and hold void legislative acts inconsistent with it. The explanation cannot be found, as Professor McLaughlin says, "in mere logical disquisition on the Constitution alone," nor in the fact alone that the Constitution was written; but the reason for Marshall's assumption is not any more satisfactorily explained by showing that other judges and writers had already assumed the same thing, or by showing that a fundamental law which was superior to legislative acts had already been much talked about both in this country and in England. The question still remains, Why had other courts already made this same assumption? Why was it that, if a fundamental law did exist, and if our written constitutions gave definite expression to such a law, it was assumed that the courts must not only enforce that law, but, in the enforcement of it, hold void acts of the legislature inconsistent with such law? The fact that such a fundamental law was talked of in England as well as in this country requires some explanation of the reason why the regular courts there have never assumed the same control over the interpretation of such a fundamental law that our courts have assumed. It is agreed that the fact that our constitutions are written is not a sufficient explanation. Professor Thayer's view, also, that during colonial times lawyers were familiar with the review of colonial enactments to determine their consistency with written charters, serves again only to illustrate a state of mind and familiarity with such questions. Such explanations do not give the ground and reason upon which the power of the courts is to be justified, and do not show why, under the same system of law, the results in England and the United States are apparently so different.

It is precisely the assumption which it is claimed was made by Marshall and other judges in this country in regard to the duty and power of the courts that has recently been made the subject of vigorous attack. It is pointed out that there has always been some opposition in this country to the idea that the courts had power to declare legislative acts unconstitutional, and the fact that such power was never established in England is much emphasized to show that the conclusion is not a necessary one. It is now asserted that this assumption of power by the courts in this country was in fact an act of usurpation. As already stated, how-

ever, the really striking fact about the matter is that almost all lawyers and judges at the time and since have accepted this exercise of power by the courts as a logical necessity, and as the only result consistent with the existence of a fundamental law such as was admittedly created by our written constitutions. The logic of the situation must have compelled strongly to this conclusion or more opposition to this result than in fact appeared would certainly have developed. The interesting inquiry therefore is to discover what there is in our institutions, and in our system of law, that makes such a result seem such a necessary and logical conclusion.

If the Constitution of the United States did establish a fundamental law, then that law was binding upon the courts as well as upon the legislative and executive departments of the government. Article VI of the Constitution expressly provides that the Constitution and the laws and treaties of the United States "shall be the supreme Law of the Land; and *the judges in every state shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." What does it mean to say that a court is bound by the Constitution and laws of the United States?

In most of our states it is also provided by the state constitutions or statutes that the courts shall be bound or governed by the common law. But being bound by the common law does not mean that our state courts do not have power to determine the meaning of the common law. That is exactly what the courts of each state do in fact; they determine conclusively, in cases brought before them, the meaning of the common law in the states in which they exercise jurisdiction. The common law is and always has been the law of courts. The existence of any law apart from a court having power to interpret and declare it is wholly foreign to the English and American conception of the meaning of law. A court is bound by law, not when it has no power to determine what the law means, but only when it is its duty to interpret and apply the particular law. Courts are bound by statutes, but that means that the courts must take such statutes into consideration in deciding cases and determine the meaning and effect of the statutes as law. As the statutes are interpreted and declared by the courts, so are they enforced as law.

A fundamental law, whether created by a written or unwritten constitution, is as much dependent for its existence as law upon the power of courts to interpret and declare its meaning as is the common law or the statutory law. A court which is bound by a fundamental law must enforce that law as such; it must treat the constitution as superior to every other source of law. To regard a legislative enactment as superior to its own interpretation of the fundamental law would be to disregard that law and be no longer bound by it. Only the judgment of a superior court could relieve it of its duty to apply the fundamental law according to its own interpretation of it. In England, Parliament being supreme as a court as well as a legislative body, there could be no fundamental law superior to the declarations of Parliament. Whatever fundamental law there is must be found in the acts and judgments of Parliament itself.

Marshall, therefore, in his opinion in Marbury *v.* Madison, attacked the problem from the right point of view when he considered the essential question to be whether the courts were bound by the Constitution. His conclusion was that the courts were bound by the Constitution, and, for him, that meant, as a matter of course, the assumption by the courts of the power to interpret the Constitution and enforce it as thus interpreted. If the courts were not thus bound to interpret and enforce the Constitution, it must follow, either that the Constitution was not the expression of a fundamental law, or that the acts of Congress should be treated as the judgments of a superior court authorized to determine conclusively the meaning and effect of that law. That the Constitution did establish a fundamental law was Marshall's first proposition; that the courts were bound by it was his second proposition, and his conclusion, or assumption, was that this required the courts to hold void legislative acts which the courts found to be inconsistent with such law. He did not consider the possibility that the acts of Congress might be regarded as the judgments of a court superior to the Supreme Court itself. Such a proposition must necessarily mean, not only that the courts provided for by the Constitution did not constitute an independent and coordinate branch of the government, but that the courts were not in fact vested with all of the judicial power. It involved not only a denial of the independence of the judiciary, but a denial of the separa-

tion of the legislative and judicial powers. It is not strange that Marshall did not stop to consider such a possibility. What neither Marshall nor any other lawyer at that time fully realized was the effect which such a separation of the legislative and judicial powers must have, when, at the same time, a fundamental law was established which must be interpreted and enforced by such a separate and independent judiciary. Not only a fundamental law, but a separate and independent judiciary was required to create the constitutional law of the United States.

It was admitted, of course, that Congress, in acting, ought to consider and decide whether its acts were consistent with the Constitution. But it could not decide such questions as a court for the simple reason that, under the Constitution, it had no power to exercise judicial functions. That is the true significance of the separation of powers under the Constitution. The legislative and executive powers must of necessity interpret the Constitution, and, in the absence of a judicial decision, act upon their interpretation of it, but such interpretation did not and could not declare the Constitution as law. The courts also must interpret the Constitution, and they too must act on their interpretation of it, but such action by the courts meant the declaration and enforcement of their interpretation as law. That is what courts are for; their judgment is conclusive upon the parties before them, and upon other parties in like cases who come after them. The conclusive judicial determination of the fundamental law, as of all law, is vested in the highest court, and as the court decides so is the law enforced. There is no difference between English and American practice in this respect. In both countries all law is determined by, and enforced in accordance with, the judgment of a court. In England the judgment of the highest court in the land upon the fundamental law is conclusive, and it is here. In England that highest court is also the supreme legislative power, and its judgment as to its own legislation is also of necessity the judgment of the highest court. In this country, where the legislative body is a legislature merely, and not a court, the legislature may have an opinion about the fundamental law, and may express it, but the law is not necessarily enforced according to such declaration of it. Our highest court, which is independent of the legislative power, has also the right and duty, in a proper case, to express an opinion

upon the fundamental law, and as the law is expressed by the court so is it enforced. That is what makes it law indeed. The expression of the legislature remains an opinion; the expression of the court becomes the law.

Take, by way of illustration, the very question of the separation by the Constitution of the legislative, executive, and judicial powers. One department of the government must not exercise powers which belong to another department, but who decides whether a particular power is legislative, executive, or judicial? The legislative determination of such a question is not conclusive upon the courts, nor is the decision of the executive power; but the determination of such a question by the Supreme Court, in a case properly before it, is conclusive upon the parties to that litigation, and that is the way in which the Constitution is enforced. If we wish to know, therefore, the effect of this constitutional separation of powers, and know the law in regard to it, we examine the decisions of the courts in cases involving that question. Courts, and courts only, can decide what is law, whether that law be called common, statutory, or fundamental. The words which Professor Gray quotes from Bishop Hoadly are just as applicable in the case of constitutional law as of any other law: "Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver to all intents and purposes, and not the person who first wrote or spoke them."

Probably there has never been any more effective judicial expression in opposition to this established power of the courts to declare legislative acts void than the opinion of Chief Justice Gibson, of Pennsylvania, in the case of Eakin *v.* Raub.[3] His argument is that the courts in this country have no greater powers than "the powers of the judiciary at the common law," and are properly concerned only with "the administration of distributive justice, without extending to anything of a political cast whatever." Therefore, as "the ordinary and essential powers of the judiciary do not extend to the annulling of an act of the legislature," it must be true also "that the power in question does not necessarily arise from the judiciary being established by a written constitution, but that this organ can claim, on account of that circumstance, no

[3] 12 Sargeant & Rawle (Pa.) 330 (1825).

powers that do not belong to it at the common law; and that, *whatever may have been the cause of the limitation of its jurisdiction originally*, it can exercise no power of supervision over the legislature, without producing a direct authority for it in the constitution, either in terms or by irresistible implication from the nature of the government."

Having thus limited the power and jurisdiction of the courts, he admits that the constitution is a law of superior obligation which binds the legislature as well as the courts, but he contends that, if, on the one hand, all the organs of government are to be considered equal, then the judgment of the "organ whose business it is *first* to decide on the constitutionality of an act" (the legislature) must be respected by the other organs; or if, on the other hand, the organs of government are not equal in every respect, then at least "each must be supposed to have superior capacity only for those things which peculiarly belong to it; and, as legislation peculiarly involves the consideration of those limitations which are put on the law-making power . . . it follows that the construction of the constitution in this particular belongs to the legislature, which ought therefore to be taken to have superior capacity to judge of the constitutionality of its own acts."

The obvious answer to the first part of this argument, which deals with the limitation of the jurisdiction of the judiciary at common law, is that it gives no consideration whatever to the jurisdiction of Parliament itself as the highest court in the land. The jurisdiction of Parliament as a court was not so limited. The significance of this fact in the development of English law will be referred to more at length subsequently. It is sufficient now to point out that the fact that Parliament was always the highest court, and that its ultimate legislative supremacy was due in large measure to that fact, necessarily destroys the basis of Chief Justice Gibson's argument as to the limited jurisdiction of common-law courts and their power with reference to legislation. The supposed limitation of the jurisdiction of the English courts, other than the High Court of Parliament, was due to their want of power as subordinate courts to question the judgments of the highest court in the land, and not to a want of power in all common-law courts to question acts of legislation as such. As to the power of the highest court in the land to consider the validity of the acts of the supreme

legislative power, that, obviously, was a question which did not arise, because the highest court and the supreme legislature were one and the same body.

In the second part of his argument, while admitting that the Constitution establishes a fundamental law binding upon the legislature as well as the courts, Chief Justice Gibson contends that the legislature has superior power to determine the validity of its own acts, and that the courts are bound by such judgment. This, of course, means, as Chief Justice Gibson says, "that *the construction of the Constitution in this particular* belongs to the legislature," and its judgment, therefore, must be respected as the judgment of a court, and the highest court in such particulars. The judgment of the legislature, in other words, must be treated, not merely as validating certain acts in spite of, or without regard to the Constitution, but as placing a judicial interpretation upon the Constitution which no other court can question.[4]

But this view of the matter necessarily creates difficulties. For instance, when Chief Justice Gibson comes to consider Article VI of the Constitution, which provides that the Constitution and all laws of the United States made in pursuance thereof shall be the supreme law of the land, and that "the judges in every state shall be bound thereby," he concedes that the courts must decide as to the validity of acts of state legislatures claimed to be repugnant to the Constitution of the United States. That is what being bound by the Constitution means. He says that this is "an express grant of a political power" to the courts. It is an express grant, however, only to judges of state courts. He concludes, however, that there is a similar grant intended in such cases to the federal judiciary on account of the provision in Article III which gives appellate jurisdiction to the Supreme Court of the United States in all cases arising under the Constitution. But this is a recognition of the fact that in all such cases the Supreme Court, and not Congress, would have the final word in determining the

[4] The proposed "recall" of judicial decisions by popular vote, though not yet authoritatively expounded, must mean, either that the people in such cases are to act as a superior court and place a construction on the Constitution which all other courts must respect and adopt in the future, or else that particular legislative acts voted on are to be treated as valid in spite of, or regardless of the meaning of, the Constitution. The difficulties and embarrassments which would result, whichever view was adopted in practice, have not yet received careful consideration.

meaning of the Constitution of the United States. The result would be that both Congress and the Supreme Court would be courts of final jurisdiction in matters involving the interpretation of the Constitution; there would be no final court of review, and there could be, under such a practice, no final determination of the meaning of the Constitution. A consistent body of fundamental law would be impossible of attainment if the validity of acts of Congress and the validity of acts of state legislatures, under the Constitution of the United States, were to be decided by independent courts having no control over one another.

It is clear, therefore, that if the Constitution of the United States did establish a fundamental law which was to be interpreted and enforced as all law is interpreted and enforced, and if the separation of powers under the Constitution was a reality, then the Supreme Court of the United States was the only court having final jurisdiction to interpret the fundamental law, and acts of Congress, as well as acts of state legislatures repugnant to that law, must be held invalid by that court. This result follows, and the assumption of power by our courts is justified, not by reason of any "mere logical disquisition on the Constitution alone," nor by virtue of an "historical background" full of expressions about a fundamental law, but by reason of the nature and meaning of English law as developed and applied in connection with the particular institutions and separate departments of government created by the Constitution. English theories and practice are not only not inconsistent with this result, but, properly understood, support and justify the constitutional powers assumed by our courts.

II.

The law of England goes back to a time when one body exercised, without distinction, legislative, judicial, and administrative functions. As Professor Adams has said,[5] it is essential to bear in mind in beginning to study the constitutional history of England "that all the functions of the state were exercised by a single institution" — the *curia regis*. "All those functions which we are accustomed to assign in the modern state to different institutions, or sets of officials, were exercised in the feudal state by the *curia*

[5] The Origin of the English Constitution, p. 345.

without consciousness of difference or an attempt at distinction." [6] Parliament itself was originally more a court than a legislature, according to our modern distinctions. It is perhaps not inaccurate to say that its power to make law in a legislative sense grew out of a better recognized and more customary power to declare existing law in a judicial sense, and the ultimate supremacy of Parliament as a legislative body, with apparently unlimited powers, was due in a large measure at least, to the fact that Parliament continued to be a court, and the highest court in the land, even after it had ceased to exercise what are now considered strictly judicial functions, and had become almost exclusively a legislative body.

The significance of this fact as an explanation of the disappearance in England after the seventeenth century of practically all reference to a fundamental law, and, at the same time, as an explanation of the totally different result in this country — the development by the courts of a complete body of constitutional or fundamental law — has not been fully realized by writers on constitutional law. There are two recent books, however, which emphasize and develop certain ideas in connection with the constitutional history of England which are of the greatest importance in the consideration of this subject, though neither writer points to the significant conclusion which the ideas so developed seem to justify. One of these is the book already referred to, "The Origin of the English Constitution" by Professor G. B. Adams; the other is "The High Court of Parliament and its Supremacy" by Professor McIlwain. The fact which Professor Adams particularly emphasizes is the development in England of an essentially feudal idea of an existing "body of understood, more or less definitely formulated rights which the king was bound to observe and which those who at any time formed the operative force of the nation had the right to force him to observe." [7] Professor McIlwain shows how this feudal fundamental law was, from the beginning, the law of a court; how the king's own courts maintained and exercised the power to interpret and declare this law to which the king was himself subject, and how the king's highest court, Parliament, grew in time from the greatest "law-declaring machine" in the land into the supreme legislative power. And the most extraordinary thing about this development of Parliament from

[6] The Origin of the English Constitution, p. 344.

[7] Id., p. 157.

a court to the supreme legislative body lies in the fact that it is the House of Commons, which originally had "no part in the judgment making function of the upper house," [8] which becomes, first, an essential part of this highest court, and finally, in effect, not only the highest court but the supreme legislative power.[9]

Professor Adams points out that Magna Carta was not only the declaration of a fundamental law, but that its main object and purpose was the assertion of a principle derived from feudalism, "that there is a body of law above the king which he may be compelled to obey if he is unwilling to do so." [10] Of equal importance, however, was the fact that the body which declared Magna Carta, and Parliament itself in the subsequent conflicts with the king, asserted, and asserted successfully, the right to declare and define what this body of law was to which the king was subject. This claim was usually made in the form of an assertion of the supremacy and sovereignty of the law, but this method of asserting the sovereignty of the law meant ultimately the supremacy of the highest court — Parliament; and the supremacy of Parliament as a court meant also, finally, its legislative sovereignty. The subsequent declaration of Coke, in opposition to the claimed sovereign power of the king, "Magna Charta is such a Fellow that he will have no Sovereign," and another expression, heard afterwards on both sides of the Atlantic, to the effect that the government is "one of laws and not of men," necessarily involve the claim that some body other than the king has power to declare and interpret the sovereign law. If the king had been willing to act upon the principle stated by Bishop Hoadly, previously quoted, he might readily have recognized the sovereignty of the law, provided only that he maintained the right to interpret it, or to appoint or control the body which did interpret it. To assert merely that the king was above the law was to lose sight of this essential power; better be bound by the law, if being bound by the law means the power to declare what the law is. The final success of Parliament was due, not only to the working out of the principle asserted in Magna Carta — that the king is subject to law — but of the establishment at the same time of the principle that all law is declared and interpreted by courts, and that Parliament is the highest court in the land.

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[8] The Origin of the English Constitution, p. 315.

[9] Id., pp. 161–163.

[10] Id., p. 167.

From the earliest times in England the law was conceived as a body of principles already existing which could be studied and learned or discovered. Courts existed for the purpose of discovering, applying, and enforcing this law. The power of holding a court was a much valued privilege of the feudal lords, and "feudal law is essentially a law of courts" [11] in the same sense that the common law later is the law of the king's courts. As Parliament is the highest of these courts, there is a tendency for the fundamental law to become more or less identified with the common law; but Parliament as a court develops a law of its own, based upon its own practice and customs, and this gives to its judicial powers a certain indefiniteness which greatly increases the possibilities of development. It enjoys a greater range and freedom in declaring existing law than is enjoyed by the regular common-law courts, and is accurately described as "the most effective law-declaring machine in the Teutonic world." [12]

Professor McIlwain has traced the activities of Parliament as a court, and, while emphasizing the fact that it is the "fusion of indefinite powers," [13] without any recognized distinction of judicial, legislative, and administrative functions, which is characteristic of the Parliament of the Middle Ages, he shows also that "the great phases of the English Parliament have been its history as a court, then as a legislature, and finally as a government-making organ," and that it "definitely passed out of the first of these stages at the first session of the Long Parliament." [14] Until that time its judgments or acts were, for the most part, more in the nature of declarations of an existing law, or declarations intended to supply rules and remedies in connection with the enforcement of such a law, than acts of legislation in the modern sense. Not only Parliament, but, as Professor McIlwain points out,[15] other courts, prior to the middle of the seventeenth century, exercised the power of declaring law apart from the decision of litigated cases. This power has survived with the regular courts only in respect to the making of rules relating to the government of their own practice and procedure, and, in this country, the line between the power of the legis-

[11] Jenks, Law and Politics in the Middle Ages, p. 24.
[12] Id., p. 44.
[13] The High Court of Parliament, p. 119.
[14] Id., pp. 93, 352.
[15] Id., pp. 135–137.

lature and the power of the courts in such matters has never been clearly drawn. But in the case of Parliament, which was the *highest* court, this power to declare an existing law had a reach which the lower courts could not attain. It is precisely this acknowledged position of Parliament as the highest "law-declaring machine" that made possible and comparatively easy its assumption of legislative supremacy. This is the fact which is of special significance in connection with our constitutional problem, and this point Professor McIlwain does not bring out clearly, if, in fact, he fully recognizes its significance.

The supremacy of Parliament is not explained by saying that after 1640 it became the legislative sovereign. The reason why it became the recognized legislative sovereign was because it previously was, and still continued to be, the highest court. Its acts were supreme and their validity unquestionable under the law, not because it was legislatively supreme, but because it was supreme judicially. There was no lower court which could question any act of both houses of Parliament as inconsistent with the fundamental law or the *lex et consuetudo parliamenti.* It could not question its declaration of the *validity* of *new* law any more than it could question its declaration of the *meaning* of *existing* law. Parliament was not at some times a court and at other times a legislature; it was always both.[16] Any act of Parliament, whether a positive enactment of new law or not, carried with it the declaration of the highest court in the land that it was in accordance with the fundamental law. There was no other court with power to interpret the fundamental law differently from the interpretation thus placed upon it by the High Court of Parliament.

As for the king, he was beaten in the contest for legislative sovereignty by the same fact that Parliament was his highest court,

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[16] See the reference by Professor McIlwain, The High Court of Parliament, p. 243, to the argument of Atkyns in the case of Sir William Williams. Professor McIlwain says that Atkyns "cannot be rid of the old idea that *in all its actions* Parliament is bound by some law; . . . he has made the transition to the idea of legislative sovereignty, but he has done it under the old forms and with the old terms. Parliament is still a court and its functions are in the main judicial, but under its *lex parliamenti* it may do any act it pleases and shall never be questioned for it beyond its walls." But the way in which the transition to the idea of legislative sovereignty was made is the significant fact about the whole matter, and Atkyns's attitude explains excellently the theory on which the idea of legislative sovereignty was based.

and as such had power to declare an existing fundamental law to which the king was subject. The making of new law consistent with the fundamental law was already a recognized power of Parliament. Although not as frequent in the past as they were to be in the future, many acts of that description had been already passed, and were, like the power to declare old law, justified by the "Lawes and Customs of the Realm," which "as well enable the exercise of this (the making of new law) as of the ordinary and judicial power." [17] What was new was the more frequent exercise of this power, and in some cases the exercise of it in such a way that the old fundamental law as previously understood was changed or modified. Parliament, being a court as well as a legislature, could do this without claiming to be above the law, while the king could not. Parliament could recognize the sovereignty of the fundamental law without weakening its own sovereignty; but the sovereignty of the fundamental law was fatal to the king's contention. Professor McIlwain, quoting Pym, brings this out clearly:

"The struggle over the Petition of Right and the question of Tonnage and Poundage did much to familiarize men still further with the idea of fundamental law. For example, when the Lords would have added to the Petition of Right the clause saving the 'Sovereign Power' of the King, a storm of protest arose in the Commons. To acquiesce in this addition would be to 'acknowledge a Regal as well as a Legal Power.' Pym recognizes clearly the sovereignty of the fundamental law, not only over the King, but over Parliament as well. 'All our Petition is for the Laws of England, and this Power seems to be another distinct Power from the Power of the Law: I know how to add Sovereign to his Person, but not to his Power: And we cannot leave to him a Sovereign Power: *Also we never were possessed of it.*'"

Professor McIlwain quotes Coke and Wentworth to the same effect. If the fundamental law was sovereign, then of course neither Parliament nor the king was possessed of such power; but to be the highest court as well as legislature was to be the maker and interpreter of sovereignty, and nothing more was needed but the continued exercise of such power to make the supremacy of Parliament a recognized fact. The continued exercise of legislative power by Parliament, with the absence of all power in any other person or

[17] The High Court of Parliament, p. 151, quoting St. John.

body as a court to question the consistency of its acts with the fundamental law, meant in time the disappearance of all discussion of the fundamental law, and the recognition of Parliament as legislative sovereign. But it remains true, nevertheless, that this legislative sovereignty of Parliament depends upon the fact that Parliament continues to be the highest court in the land, and that when it acts at all it acts as a single body having both legislative and judicial power.

We can now understand the true aspect and significance of the controversy between king and Parliament after 1640, when Parliament had fully realized its power and had begun, with definite purpose, to make new law and legislate continuously in the modern sense. Assuming that the king was bound by the old established fundamental law, even as declared by Parliament, was he also bound by this new law of Parliament which was admittedly often different from the fundamental law as previously recognized and apparently established by precedent? The question is no longer, Is the king bound by the established law? but, Who has power and authority to enact and create as law that which was not known as law before? The question, therefore, which is argued back and forth by the political writers of this period is this question of legislative sovereignty. To quote Professor McIlwain again:

"The royalist writers are as much affected by the change as their opponents. For the future, there is little difference whether the writers be royalist or parliamentarian, — they both accept the new idea of *legislative sovereignty*. For the royalists this sovereignty lies in the King alone, for their opponents in the Parliament; but both reject the idea of a supremacy of law. To say with Hobbes and Filmer that the King is above the law, or with Milton that Parliament can make or unmake any law whatsoever, is to deny the traditional doctrine. The functions of King and Parliament are not *jus dicere*, as Coke thought but *jus dare*. Judicial supremacy has given place to legislative sovereignty, whether the sovereign be the King or the Parliament. Speculators on both sides would have agreed with the admirable summary of Hobbes: 'It is not wisdom, but authority that makes a law.'" [18]

And so law comes to be defined as the command of the sovereign.

But it is not accurate to say that "judicial supremacy has given

[18] The High Court of Parliament, p. 94.

place to legislative sovereignty," or that "the traditional doctrine" is denied by both parties. The truth of the matter is better expressed by saying that it was by virtue of its judicial supremacy that Parliament exercised the power to determine this new question according to law, and that only so could the "traditional doctrine" be maintained. This question of legislative sovereignty, or rather, the question of the validity under the fundamental law of these new acts of Parliament, if it was to be settled according to law, must be determined by the highest judicial authority. Hobbes and Filmer and Milton might write countless books about the question, but the question could be settled according to the established practice of English law only by the highest court in the land. If the controversy was to be determined in that way, the outcome could not be in doubt, since Parliament was already admittedly the highest court in the land. And it is precisely upon this power to declare the fundamental law to which the king was subject that Parliament based its contention. The king was still the "fountain of justice," but Parliament was his highest court. This position was definitely stated in 1642 when Parliament made the declaration in answer to the king's proclamation forbidding his subjects to obey the order of Parliament for mustering the militia. This is quoted by Professor McIlwain, and the significant portion is as follows:

"It is acknowledged that the King is the Fountain of Justice and Protection, but the acts of Justice and Protection are not exercised in his own Person, nor depend upon his pleasure but by his Courts, and by his Ministers who must do their duty therein, though the King in his own Person should forbid them: and therefore if Judgments should be given by them against the King's Will and Personal command, yet are they the King's Judgments. The High Court of Parliament is not only a Court of Judicature, enabled by the Laws to adjudge and determine the Rights and Liberties of the Kingdom, against such Patents and Grants of His Majesty as are prejudicial thereunto, although strengthened by his Personal Commands, and by his Proclamation under the Great Seal, but it is likewise a Council to provide for the necessity, to prevent the imminent Dangers, and preserve the publick Peace and Safety of the Kingdom, and to declare the King's pleasure in those things that are requisite thereunto, and what they do herein hath the stamp of Royal Authority, although his Majesty seduced by evil Council, do in his own Person oppose or interrupt the same, for the King's Supream and Royal pleasure is exercised and declared in this High Court of Law

and Council after a more eminent and obligatory manner, then it can be by any personal Act or Resolution of his own." [19]

In this declaration we have the idea clearly expressed, not only that the High Court of Parliament is a court of judicature whose judgments are the judgments of the king, but that it has power also, as "High Court of Law and Council," to pass enactments necessary to the public peace and welfare and declare the validity and binding effect of such enactments. It is not by virtue of its legislative supremacy alone, but by virtue of its judicial supremacy that such enactments of Parliament are validated and become the judgments of the king himself. The king is subject to the law, and to the law as declared by his own highest court.

Even after Parliament's legislative sovereignty is fully accepted, and the two houses together act only as a legislature acts, and not as a court, the fact that Parliament is a court is still recognized. The statement of Coke, "that the lords in their house have power of judicature, and the commons in their house have power of judicature, and both houses together have power of judicature," [20] continues to be the accepted legal theory. The great cases on parliamentary privilege serve excellently to illustrate this. The theory of the seventeenth century seems to have been that the legislative power and the privileges of Parliament were determined, not by the common law or the law of the land, but by the law and customs of Parliament, which Parliament alone could authoritatively determine and declare. Professor McIlwain quotes the statement of the Attorney General in Fitzharris's Case to this effect,[21] and Coke emphatically expressed himself of the same opinion. The question which arose in subsequent cases was, whether the House of Commons alone could conclusively decide the scope of its own privileges, so that its determination could not be questioned in other courts. Coke considered the determination of the House of Commons conclusive upon the common-law courts, because a matter in Parliament "is not to be decided by the common laws, but *secundum legem et consuetudinem parliamenti*," [22] and the courts of Parliament, and not the common-law courts, were the only courts having jurisdiction to determine conclusively

[19] The High Court of Parliament, pp. 389–390.
[20] Institutes, Fourth Part, p. 23.
[21] The High Court of Parliament, p. 238.
[22] Institutes, Fourth Part, p. 14.

the meaning of that law. This view, however, did not prevail in the later cases, and the *lex et consuetudo parliamenti* was held to be a part of the same law of the land which it was the duty of all judges to know or ascertain. A judgment or enactment of both houses of Parliament was conclusive in other courts, because the judgment of the highest court in the land, but there was no law with reference to which either house by itself was supreme. Lord Denman in the great case of Stockdale *v.* Hansard [23] says:

"Parliament is said to be supreme: I must acknowledge its supremacy. It follows, then, as before observed, that neither branch of it is supreme when acting by itself. It is also said that the privilege of each house is the privilege of the whole parliament. . . . But it by no means follows that the opinion that either house may entertain of the extent of its own privileges is correct, or its declaration of them binding."

Pike, in his Constitutional History of the House of Lords, p. 248, refers to a case in the reign of Henry VI of a petition of the House of Commons to the House of Lords on behalf of Thorpe, Speaker of the House of Commons, who had been tried in the Exchequer on a certain charge, and the Lords summoned the judges on the question of privilege, and Chief Justice Fortescue replied that they

"ought not to make answer, for it hath not been used aforetime that the Justices should in any wise determine the privileges of this High Court of Parliament. For it is so high and mighty in its nature that it may make law, and that that is law it may make no law, and the determination and knowledge of that privilege belongs to the Lords of the Parliament and not to the Justices."

Patterson, J., in the same case says:

"With respect to the interpretation and declaration of what is the existing law, the House of Lords is doubtless a superior court to the courts of law. And those courts are bound by a decision of the House of Lords expressed judicially upon a writ of error or appeal, in a regular action at law or suit in equity, but I deny that a mere resolution of the House of Lords, or even a decision of that house in a suit originally brought there . . . would be binding upon the courts of law."

Holroyd's argument in the previous case of Burdett *v.* Abbot [24] develops this view at length, and meets the objection that the privileges of the House of Commons would, in that event, be de-

[23] 9 Adolph. & Ellis 1 (1839).

[24] 14 East 1 (1811).

termined by its rival, the House of Lords, on appeal from the lower courts, by saying that any privilege "is the joint privilege of the whole parliament," and the Lords "cannot negative the claim of the commons without deciding at the same time against their own privilege." Needless to say this does not permit the House of Commons to decide its privileges for itself. The objection which the judges made to that claim was that the House of Commons might not confine itself to the privileges already established by the law of the land, but might enlarge its privileges, without regard to precedent. The determination of the law by resolution or declaration merely, when made by either house alone, the judges would no longer assent to, even though admitting that each house separately was a court. "No resolution of either house of parliament, *taking it to have decided judicially upon the matter before it*, can make that a legal privilege of parliament which was not so before by law. . . . A new privilege can only be enacted by act of parliament."

This claim of either house in the matter of privilege was, however, precisely the same claim that had been made by the whole Parliament, and sustained, in the matter of legislation or the right to make new law. That claim too had been based upon Parliament's supremacy as a court. And even in this matter of privilege, the supremacy of both houses acting together as a court is still recognized. After pointing out that the House of Lords could decide the question of privilege in a regular cases coming to it on appeal from the lower courts, Holroyd goes on to say, citing Lord Hale, that the judgments of the House of Lords are not "irremediable, though no person can appeal as a matter of right; for there are many instances in which the whole parliament have interfered by passing an act to correct or *reverse* a judgment of the house of lords, and in that way the commons themselves might, by the weight and influence of the means they possess, ultimately assert their own right, if upon a full investigation of the matter by the whole parliament, it should be found that *any error* had crept into such a judgment, or that the privilege claimed was such as ought in future to exist." This shows a recognition of the fact that both houses of Parliament might still act as a court as well as a legislature, though not strictly a court of appeal.[25]

[25] There are other powers which are still recognized as belonging to the Houses of Parliament because they are courts. In the case of Kielly *v.* Carson (4 Moore's P. C.

The judges in the later English cases do not fairly meet the contention of Coke on the question of privilege and the *lex et consuetudo parliamenti*. They argue as if Coke's whole contention was that the judgment of the House of Commons on the question of its privileges must be conclusive because the books and records on which its judgment was based were accessible only to that house, and could not be known or examined by the judges of other courts. But that is not the real ground of Coke's contention. With Coke all law was not only a matter for experts, something which only the judges could define, but all law was the law of some particular court. The common law was the law of the common-law courts; canon law was the law of the ecclesiastical courts; and the *lex et consuetudo parliamenti* was the law of the courts or houses of Parliament. The House of Commons alone would not have jurisdiction to determine the common law to the exclusion of the common-law courts, but its determination of matters based upon the law and customs of the House of Commons was within its peculiar jurisdiction to the exclusion of the common-law courts. This view, although it did not prevail, is not answered by the later English judges. The common-law courts gradually absorb all the different kinds of law, which all become a part of the law of the land. Except for the appellate jurisdiction of the House of Lords, the regular business of Parliament is now legislative, and the *lex et consuetudo parliamenti* disappears as a separate body of law, because there are no separate courts having exclusive jurisdiction to declare it. The common law is no longer the law of the common-law courts; it is the law of the land, or the law of England — a general law — and the decisions of the courts are said to be only evidence of this law.[26] There is no longer a fundamental law which is different

63) it was held that the legislative assembly of Newfoundland could not claim the power to punish for contempt on the ground that such power was essential to the exercise of its functions as a legislature, and the power of the houses of Parliament in this regard was justified by virtue of the fact that they were courts. And in Kilbourn *v.* Thompson (103 U. S. 168) our Supreme Court denied the power of Congress to punish for contempt, on the ground that Congress was a legislative body merely while Parliament was a court and exercised such powers as a court. It should be noticed, however, that in another case (Maynard *v.* Hill, 125 U. S. 190) the power of legislative bodies in this country to grant divorces is justified on the ground of usage derived from the practice of Parliament, obviously a dangerous ground on which to base the powers of legislative bodies in this country.

[26] See Holroyd's argument in Burdett *v.* Abbot, *supra*.

from this general common law, but the common law is all the law there is, with the exception of the new law created by statute. The common law and the statutes make up the whole law of England, and Parliament as a legislative body is supreme. That is the modern doctrine.

But while it is true to-day to say that Parliament is above the law, if we mean by that that it is not subject to law as declared and enforced by the regular courts, it is more accurate historically to say that Parliament is still subject to law, but that it is not subject to be controlled by other courts.

III.

The conclusion is that there is no difference in theory between the fundamental law of England and the fundamental law of this country. In both countries the fundamental law may still be called sovereign, and in both countries the fundamental law is subject to the interpretation and declaration of courts. The difference in practical results is not due to the fact that in one country there is a written constitution and in the other there is not. The real difference is due to the fact that in England the body that legislates has also the power to interpret the fundamental law and determine the validity of such legislation, while in this country the body which legislates has no power as a court to interpret the fundamental law, but there are courts which are also bound by the fundamental law, and, being so bound, must as courts interpret the fundamental law and declare the validity or invalidity of legislative acts under that law. Congress, as has been pointed out,[27] must, in the first instance, pass upon the validity of its own enactments, and, while its judgment is entitled to great respect, it is necessarily only a legislative judgment. The courts are still bound, if the Constitution is an expression of fundamental law, to determine judicially the validity of acts of Congress under that law. No other result is logically possible, unless either the Constitution is disregarded as law or Congress is made the highest court for its interpretation. In either case the fundamental law which we now have would disappear.

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[27] Thayer, Legal Essays, p. 9.